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Supreme Court of the United States

OCTOBER TERM, 1972

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NO. 72-549

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, *et al.*,
Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

NO. 72-550

CAROLYN BRADLEY, *et al.*,
Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Introduction

The Briefs of the petitioners and respondents and the Memorandum of the United States[1] exhibit marked dis-

[1] Throughout this Reply Brief, in addition to the abbreviations in citations previously employed by the parties (see the first footnote in each of the Briefs of the parties), the opening briefs and the government's memorandum will be identified as follows:

agreement in the framing of the decisive issues of this case. They are, however, in agreement upon a number of points. We devote this Reply Brief to a canvass of the agreements and disagreements, in the hope that, by focusing the controversy between the parties, we may facilitate the Court's resolution of it.

Petitioners and the United States are in substantial agreement as to the precise issue involved: whether the relief decreed constituted an abuse of the remedial powers of the District Court. (See U.S. Br. 2, 4.) However, both the respondents' characterization of the issue as one of "violation" and the manner in which they (and the United States) analyze the District Court's exercise of remedial discretion, create unwarranted confusion. The predicate of respondents' and the government's arguments—namely, that all vestiges of discrimination had been eliminated and that the Richmond, Henrico and Chesterfield school systems were "unitary" when these proceedings were brought—is demonstrably false on this record.

A. *The Issue of Constitutional Violation*

1. Respondents construct the major part of their argument upon the proposition that "before the federal judiciary can intervene in local school affairs the existence of a constitutional violation must be established by way of predicate for its action." (St. Br. 50.) Petitioners entirely agree. (See Pl. Br. 62-66; RSB Br. 91.) The disagreement between the parties concerns not the need for, but rather the identity of, the relevant constitutional violation in this case. (See Pl. Br. 57; RSB Br. 76-77.)

Brief for plaintiffs (Petitioners in No. 72-550) as "Pl. Br. ——"; Brief for the Richmond School Board (Petitioners in No. 72-549) as "RSB Br. ——"; Brief for the state and county defendants (Respondents in both cases) as "St. Br. ——"; and the government's memorandum as "U.S. Br. ——."

2. Petitioners and the District Court see the constitutional violation in relatively simple terms that respondents' brief strains to overlook. The violation is that the public schools of the Commonwealth of Virginia within the City of Richmond (as well as in the Counties of Chesterfield and Henrico) were racially segregated by law and by the purposefully segregatory acts of state and local officials, before 1954, in 1954, and for almost two decades thereafter. (See Pl. Br. 11-16, 64-66; RSB Br. 30-47, 67-70, 86-91.) Respondents' adamant refusal to talk about this long-continued, uncontestable *de jure* segregation does not make it go away. Respondents' silence on the score does not make it any less a constitutional violation, or *the* constitutional violation that underlies this protracted litigation. Hence, the only question confronting the District Court was how this enduring denial of fundamental constitutional rights could be effectively vindicated. This search for an effective remedy provides the lens through which all other aspects of this case must be viewed.

3. Much of the respondents' brief consists of an attempt to obfuscate this constitutional violation by the enumeration and refutation of a succession of *other* possible theories of "constitutional violation." (St. Br. 57-87.) Inasmuch as the enumerated theories are neither petitioners'[2] nor the District Court's, their refutation by respondents fails to join issues of any consequence. We agree with a great deal of what is said in these pages of respondents' brief, but not with its relevance to *this* case. The petitioners

[2] Respondents argue, based on evidence introduced to demonstrate the effectiveness and feasibility of a desegregation plan which crossed school division boundary lines—the only desegregation plan of this nature put before the District Court—not that the remedy is ineffective or impracticable, but that this evidence was elicited by the petitioners and employed by the District Court to establish constitutional violations.

have never maintained that any constitutional violation flows from the absence of a "viable racial mix" (St. Br. 58-61);[3] or from the mere fact that there are concentrations of blacks in Richmond and whites in Henrico and Chesterfield (St. Br. 61-72);[4] or from the mere proximity

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[3] We have never argued that the Constitution requires the assignment of any fixed or specific percentages of black and white children to a school or schools (see Pl. Br. 58-59; RSB Br. 76-77), and the District Court neither found nor ordered any such thing (see Pl. Br., App. A. 1a-5a; RSB Br. 50-51). Respondents here pursue their tactic, largely successful in the Court of Appeals (see Pl. Br. 50-51; RSB Br. 51-52), of confusing the reasons for the Richmond School Board's proposal of a particular form of inter-division desegregation plan (which included, quite properly, educational as well as constitutional considerations, see St. Br. 18-32) with the District Court's distinct reasons for concluding that some form of inter-division desegregation plan was necessary (which were, with equal propriety, entirely constitutional reasons). Respondents correctly note that the District Court quoted testimony of Dr. Pettigrew and other educational experts concerning a "viable racial mix" or enrollment proportion likely to remain stable (St. Br. 30-31). They ignore (1) that these quotations occur in the extensive "additional findings of fact as supplemental to [the District Court's] . . . general findings of fact" (338 F. Supp., at 116-230, Pet. A. 185-345), in which virtually all of the evidence in this voluminous record is recalled and appraised, rather than in the portion of the court's opinion describing the factual and legal bases of its constitutional ruling (338 F. Supp., at 79-116, Pet. A. 185-263); (2) that the District Court was necessarily concerned with the educational soundness of the Richmond School Board's plan, in addition to (not as a prerequisite of, see note 2 *supra*) its satisfaction of constitutional objectives (*e.g.*, 338 F. Supp., at 115, Pet. A. 262-63); and (3) that the District Court expressly held:

> While the viable racial mix contemplated by the plan is educationally sound and would indeed result in a unitary system, variations from the suggested viable mix may be unavoidable. All parties are admonished that it is not the intention of the Court to require a particular degree of racial balance or mixing. (338 F. Supp., at 230, Pet. A. 519-20).

[4] Petitioners need not claim, on this record, that "*[c]oncentrations of blacks in cities and whites in suburbs . . . of itself . . . [constitutes] a constitutional violation*" (St. Br. 61), or that the mere "*proximity of majority-black to majority-white schools . . . [affords] a constitutional violation*" (St. Br. 85). These contentions continue to be "as much beside the point in Richmond, Vir-

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of majority-black schools to majority-white schools (St. Br. 85-86);[4] or from the strong community of interest between

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ginia as it would have been beside the point in *Swann* to consider whether, without more, a State's use of the neighborhood school system violates the Constitution as applied to neighborhoods of differing racial concentration" (Pl. Br. 58; see *id.*, 57-61, 73-77). The close proximity of identifiably "black" and "white" schools on either side of the Richmond City boundary lines (Pl. Br. 8-10, 67, 86-87; RSB Br. 29-30), and the increasing concentration of blacks in the center-city ghetto of Richmond (Pl. Br. 30-35, 95-97, App. F, 1f-4f; RSB Br. 22-27, 68-70) were factors that added enormously to the difficulty of desegregating the Richmond area schools, and they were therefore properly considered by the District Court in its efforts to arrive at an effective desegregation plan. So, too, the District Court properly considered the prospect that a Richmond-only desegregation plan would hasten the conversion of the City into an all-black ghetto. (See Pl. Br. 30-33, 67-68, 96; RSB Br. 69-70.)

But these factors are not—and neither petitioners nor the District Court have ever asserted that they were—independent, isolated violations of the Constitution which alone justify the relief decreed. For this reason, respondents' invocation of *James* v. *Valtierra*, 402 U.S. 137 (1971) (St. Br. 69) as the response to extensive evidence of racial discrimination in housing in the Richmond area (see Pl. Br. 33-35; RSB Br. 38-44, 67-69) is wide of the mark. In the first place, it is not correct, as respondents imply, that the exclusion of blacks from housing in the counties is entirely a matter of the unavailability of low-cost housing. For example, the federally assisted, moderate rental multi-family housing which *is* located in the counties is virtually all-white (PX 129, 130). The District Court also could properly infer from the unrebuttted testimony of black witnesses (A. 461-67; 21 R. 42-49), the long-maintained racially discriminatory real estate advertising policies of Richmond newspapers (PX 42) and other evidence of pervasive racial discrimination (see generally, Pl. Br. 33-35) that Dr. Taeuber was correct in his testimony (A. 632) that the highly segregated nature of the greater Richmond community was not attributable solely to the effect of economics. And unlike respondents' assumptions that restrictive covenants ceased to affect housing patterns after 1950 (St. Br. 67), the District Court considered both expert testimony to the contrary (A. 736-39) and statements to the contrary by the President of the United States and the Assistant Attorney General (PX 90, 126). Thus housing discrimination—like the other forms of overt racial discrimination which this record establishes are pervasive in the Richmond area—could properly be considered by the District Court in projecting that a school desegregation plan

Richmond, Henrico and Chesterfield (St. Br. 71-72);[5] or from the failure of the respondents to offer an alternative plan of inter-divisional desegregation (St. Br. 84).[6] Largely

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limited to Richmond City would spawn exclusionary practices designed to keep blacks out of the counties. (See Pl. Br. 96-97.) But, in any event, the inability of blacks to find housing in the counties, whether it results from racial discrimination or from economic disadvantages (see Pl. Br. 91-93 n. 158), was an appropriate consideration for the District Court in determining the likely "effectiveness" (*Davis*, 402 U.S. at 37) of a Richmond-only plan to desegregate the area's schools. (See Pl. Br. 86-98; RSB Br. 70-72.) *Cf. Brewer v. School Board of Norfolk*, 397 F.2d 37 (4th Cir. 1968).

[5] Petitioners made no such argument, either below or in our original briefs. Significantly, respondents do not direct the Court to any portions of the District Court's opinion (see St. Br. 71-72), for there is nothing in that opinion which even remotely suggests "that a single community of interest in Richmond and the adjacent counties gives rise to a constitutional requirement" of an inter-division plan (St. Br. 71). Rather, the District Court quite correctly took account of the interdependence throughout the area in gauging the degree to which schools remained racially identifiable at the time of its decree and in weighing the feasibility of an inter-division plan. (See Pl. Br. 92-95; RSB Br. 62-64.)

[6] Petitioners' briefs noted that the Richmond Board's plan was the only inter-division plan put before the District Court, notwithstanding ample opportunity was afforded to all parties to submit alternative plans. (Pl. Br. 46, 61-62, App. B, 1b-3b; RSB Br. 47-48, 70-71.) Because a district court's approval of the only constitutionally adequate plan proposed by any party manifestly does not constitute an adoption by the court of that party's non-constitutional reasons for preferring the plan to other possibly constitutional alternatives, we had hoped that the respondents might appreciate the irresponsibility of confusing, on this record, (i) the Richmond School Board's educational objectives in selecting the plan, with the District Court's constitutional objectives in approving it (see Pl. Br., App. A, 4a), or (ii) the consolidation form of plan chosen by the school board for reasons of practicality (A. 240) with "any general assertion [by the District Court] of a sweeping power . . . to 'compel one of the States of the Union to restructure its internal government'" (Pl. Br. 61; see *id.*, App. B, 1b-3b). Respondents nevertheless persist in promoting both confusions—the first of which is the basis of their "viable racial mix" argument discussed in note 3 *supra*, and the second of which appears in their extravagant formulation of the political question-

uncontradicted evidence of these facts was properly considered by the District Court in determining that Richmond-only desegregation plans would not be effective and that the plan proffered by the Richmond School Board was the only alternative before the court holding out any promise of providing effective relief. But this evidence was not taken by the District Court to establish new and independent constitutional violations.

We agree in part and disagree in part with the last two propositions stated in respondents' needless and fruitless quest for a "constitutional violation." It is true that the *"failure" of "the State Board* [of Education] *. . . to consolidate the three systems . . . did not violate the Constitution,"* standing alone (St. Br. 79; *see id.*, 79-84). But the cooperation of Virginia's several educational authorities in numerous segregatory schemes that ignored local school division lines, while standing solidly upon those lines as bulwarks against desegregation, was, of course, one of the many means by which the Commonwealth historically promoted separation of the races in the public schools and resisted its termination. (*See* Pl. Br. 84-86; RSB Br. 64-66.) *"History does not afford a constitutional violation"* (St. Br. 73; *see id.*, 73-78) if viewed with the supercilious anachronism that mentions Virginia's "membership in the Confederacy during the Civil War" (St. Br. 73) and glosses disingenuously over everything that followed. But the recent history of Virginia's unremitting hostility and resistance to school desegregation (Pl. Br. 11-16, 18-22; RSB Br. 32-44) is plainly relevant both to the racial identifiability of disproportionately black schools today and to the choice of means necessary to disestablish

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Tenth Amendment argument advanced at St. Br. 103-04—while they erect and instantly demolish *"failure . . . to offer an alternative plan"* as an independent claim of constitutional violation. The claim is none of ours.

them. (See Pl. Br. 86-97; RSB Br. 77-91). To assert the contrary simply insults the intelligence of the Court as well as the sensibilities of a People brutalized by having to witness the entire governmental machinery and public life of a State committed overtly to resisting the constitutional command that they be treated decently and equally as American citizens.

4. Respondents, and the United States to a somewhat lesser degree, also seek to obscure and avoid the continuing constitutional violation by asserting that it does not warrant the relief fashioned by the District Court because the "three distinct school systems involved in this case are no longer dual systems; each is a unitary system" (St. Br. 52; see *id.*, 50-88).[7] Logically, this assertion begs the question, of course; factually, it ignores the specific, detailed findings to the contrary of the District Court (see Pl. Br. 42-44, 64-66; RSB Br. 12, 37-43, 69, 104-06) that all three school divisions, whether considered separately or together, remained segregated at the time when the county and state defendants were brought before the court and when relief against them was ordered;[8] legally, the argument rests

[7] The assertion by the United States that the District Court "assumed" or "presumed" that all three systems were operating unitary systems (U.S. Br. 2, 8, 9, 10) is negated by the very portion of the lower court's opinion cited by the government (338 F. Supp., at 104, Pet. A. 238), which is set out in full in text at p. 13 *infra*. Interestingly, the United States nowhere in its Memorandum itself advances the thesis that any of these school divisions had become "unitary" during this litigation. *Compare* U.S. Br. 7 n. 8, 17.

[8] Ordinarily, the existence of a legal violation or other condition giving rise to a cause of action is determined as of the time litigation is filed. *E.g., United States* v. *Board of School Commissioners of Indianapolis*, No. 72-1031 (7th Cir., February 1, 1973), slip op. at p. 13, *aff'g* 332 F. Supp. 655 (S.D. Ind. 1971); *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *cf. United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). As we pointed out in our opening briefs (Pl. Br. 64-66; RSB Br. 69),

upon a misrepresentation of the meaning of the District Court's findings as to Richmond,[2] and upon a misconception that HEW satisfaction with the belated desegregation plans for Henrico and Chesterfield also satisfied the Con-

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there is no issue as to an initial violation. And the Court of Appeals agreed that there was a continuing, unremedied violation at the time of joinder (see 462 F.2d, at 1065, Pet. A. 571-72). There was, therefore, no lack of power in the District Court to fashion an appropriate remedy. In any event, as the District Court found, racially segregated schools within each division had not been disestablished effectively even at the time the decree was entered.

[2] By isolating various portions of the District Court's August 17, 1970 opinion and April 5, 1971 opinion from their context, respondents seek (St. Br. 6-16) to convey the impression that the District Judge had been fully satisfied that an effective, operable plan for Richmond had eliminated all vestiges and effects of school segregation—and thereafter ordered the plan changed because he accepted educational, nonconstitutional justifications for the change. Study of the entire opinions demonstrates the inaccuracy of this characterization.

The District Court's August 17, 1970 comments regarding the estimated efficacy of the Foster Plan (St. Br. 14) were intended to emphasize the contrast between the relative effectiveness of the plaintiffs' plan and those which had theretofore been submitted by the Richmond School Board. It deserves emphasis that the court's remarks were made in the light of then governing law in the Fourth Circuit, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138 (4th Cir. 1970), *rev'd* 402 U.S. 1 (1971); thus, the reference to "no intractible remnant of segregation in the City of Richmond" which could not be reached within a reasonable busing time.

These comments were made entirely without reference to, or consideration of, the question whether a plan which achieved the maximum feasible desegregation within Richmond might yet fail to fully satisfy the Constitution in light of the particular circumstances later developed on this record. No pleadings addressed to that issue were pending at the time of the court's ruling (an earlier motion to file a third-party complaint against the county school boards was withdrawn August 7, 1970 [A. 17, 19]); neither the counties nor the State Board (parties the District Court later held should be joined before the issue was decided) was yet represented in the litigation (see 36 R.; 51 F.R.D. 139, Pet. A. 48-57). With respect to the District Court's April 5, 1971 opinion, we detailed the explicit reservations delineated by the court in our opening briefs (Pl. Br. 38-39, n. 62; RSB Br. 10-11).

stitution.[10] But the more basic failing of respondents' approach is that it wholly misconceives the meaning of a "unitary" school system, and the time at which a formerly dual system can be said to have achieved a "unitary" character.

Green v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968) requires (1) consideration of all feasible alternative plans of desegregation; (2) selection of the option offering the greatest promise of effective relief; (3) evaluation in actual practice of the plan selected; and (4) its modification, or the selection of other alternatives, if evaluation demonstrates that the plan has proved ineffective to eliminate racially identi-

[10] While courts have often said the HEW guidelines are entitled to "great weight" in evaluating the progress of desegregation, *e.g.*, *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965); *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965), the responsibility to adjudicate has never been abdicated to the administrative agency. *See Lee* v. *Macon County Board of Education*, 270 F. Supp. 859 (M.D. Ala. 1966); *Kemp* v. *Beasley*, *supra*, 352 F.2d at 19: "It is for the courts, and the courts alone, to determine when the operation of a school system violates rights guaranteed by the Constitution." Several factors in this case support the District Judge's determination to probe further than the proffered "HEW approval" of Henrico and Chesterfield schools. The exhibits referred to by respondents (St. Br. 10-12) respecting Henrico, for example, demonstrate that HEW's characterization of the system as "unitary" in 1969 (Ex. A. 97e) was no bar to the requirement by the agency of further desegregation measures in 1970 and 1971 (Ex. A. 99e, 103e). Furthermore, the District Court had reason to believe *in the light of this litigation* that HEW might be applying less stringent standards than the Constitution required. See 317 F. Supp., at 563-66, Pet. A. 13-20. The same conclusion has been reached by another district court in a lawsuit brought to compel compliance with the law by the agency. *Adams* v. *Richardson*, Civ. No. 3095-70 (D.D.C., November 16, 1972 [memorandum opinion], February 16, 1973 [order]). And in any event, the District Court found that vestiges of the dual system remained in each of the counties at the time of the hearing and that they were not "unitary" when its decree was entered.

fiable schools.[11] The notion of a "unitary" system was carefully explained in *Swann* in both conceptual and operational terms. Conceptually, it describes a system that has "achieved full compliance with this Court's decision in *Brown* I." (*Swann*, 402 U.S., at 31). Operationally, it describes a finding whose consequence is that a federal district court must dismiss a school desegregation case as closed and finished business. (*Swann*, 402 U.S., at 31-32.) But in light of *Green*, *Raney* v. *Board of Education*, 391 U.S. 443 (1968), and cognate cases,[12] it is perfectly plain that the finding of "unitary" character and consequent dismissal cannot come so soon as a plan has been

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[11] Thus unitary status is not achieved with initial selection of a plan, but only when it has been shown that the plan is fully effective in practice or that no feasible alternatives promising greater prospect of effective relief are available. As the District Court stated,

> Against this background the "desegregation" of schools within the city and the counties separately is pathetically incomplete. Not only is the elimination of racially identifiable facilities impossible of attainment, but the partial efforts taken contain the seeds of their own frustration. As before, and as courts have seen happen elsewhere and sought to prevent, racially identifiable black schools soon became almost all black; Richmond has lost about 39% of its white students in the past two years. Time and again courts have rejected half-measures as insufficient to fulfill school authorities' affirmative duty, well aware that otherwise the achievement will be only temporary. That school authorities may even in good faith have pursued policies leading to some desegregation and may in fact have achieved some results does not relieve them of the remainder of their affirmative obligation. *Clark* v. *Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970). *If the existing assignment program, be it by freedom of choice, a pupil placement system, residential zoning, or some combination thereof, does not, upon consideration of alternative means, work effectively to abolish the dual system, it is legally defective.* [citations omitted] (338 F. Supp., at 103-04. Pet. A. 237-38). (emphasis added).

[12] *E.g.*, *Lemon* v. *Bossier Parish School Board*, 446 F.2d 911 (5th Cir. 1971); *Wright* v. *Board of Public Instruction of Alachua County*, 445 F.2d 1397 (5th Cir. 1971).

adopted which the District Court believes *will* finally satisfy constitutional requirements. The finding and dismissal must wait until the District Court has observed the operation of the plan in actual practice and has concluded that it is working in such a fashion that "'the goal of a desegregated, non-racially operated school system is rapidly and finally achieved'" (391 U.S., at 449).

Palpably, this stage had not arrived in any of the three school divisions—Richmond, Chesterfield *or* Henrico—at the time of the District Court's decree, *or* of the Fourth Circuit's reversal; nor has it yet arrived in any of the three divisions. Therefore, unless the explicit language of *Green*, *Swann*, and *Raney* is ignored, none of the three divisions can be called "unitary" or relieved of the continuing power of a federal court to modify and extend desegregation remedies as needed,[13] until full "unitary" status *is* achieved.

It was for this reason that the District Court properly concluded that the original constitutional violation of racially segregated public schools in the Richmond area had never been remedied and that the court was empowered and obligated to address its remedial process to that continuing violation with due recognition of the fact that the "maintenance of segregation in an expanding community . . . creates problems, when a remedy must eventually be found, of a greater magnitude in the present than existed

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[13] *E.g.*, *Hall* v. *St. Helena Parish School Board*, 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969) (freedom-of-choice); *Kelley* v. *Metropolitan County Board of Education*, 436 F.2d 856 (6th Cir. 1970), 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) (geographic zoning); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 453 F.2d 1377 (4th Cir. 1972) (feeder patterns).

t an earlier date . . . ." (338 F. Supp., at 91, Pet. A. 210). As the District Judge wrote:[14]

> The institution within the three existing school districts of something which might in some other context pass for desegregation of schools is a phenomenon dating at best from the opening of the 1971-72 school year, which took place during the trial of this case. Prior thereto each system was in some respect non-unitary, and the Court is not fully advised as to the current status of the county system[s]. Even were each existing system, considered in a vacuum, as it were, to be legally now unitary within itself, the question still remains whether state policy having the effect of preventing further desegregation and foreseeably frustrating that which has been accomplished to date may be imposed upon a very recently achieved desegregated situation. Momentary unitary status—*assuming it existed here, which has not been shown*—will not insulate a school division from judicial supervision to prevent the frustration of the accomplishment. (338 F. Supp., at 104, Pet. A. 238). (emphasis added).

The Issue of Remedy

l. Respondents apparently agree with petitioners that a constitutional violation is established upon this rec-l, the *power* of the District Court to remedy it by an erdivision desegregation plan is unquestionable. (See Br. 62-82.) We take this to be the meaning of re-ndents' passing immediately from the issue of "con-

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As noted above, see pp. 8, 12, note 11 *supra*, the District rt found as a fact that each of the school divisions was non-ary, and further that Richmond could not itself end its non-ary system because of the State's long delay in commencing pliance with *Brown*. (See Pl. Br. 88-100.)

stitutional violation" (St. Br. 50-87) to the "Factors to Be Weighed in Determining the Validity of the District Court's Remedy" (St. Br. 87; see *id.*, 87-104)—factors that are meaningful only as a matter of discretion, not of power. (See Pl. Br. 82-100.) And as we have noted above, the government states the issue solely in terms of discretion. (U.S. Br. 2.)

2. The arguments of both respondents and the United States addressed to remedy are predicated upon their contention that the District Court approved an inter-division desegregation plan for the sole purpose of achieving a viable racial mix. (See, *e.g.*, St. Br. 88, 96, 104; U.S. Br. 2, 9, 11, 17, 21.) We have previously considered this assertion in note 3 *supra*. We reiterate the point here because of the pivotal position accorded to the notion by respondents and the government.

The District Court was concerned—as a reading of its *entire* opinion or the *entire* section containing its general findings and legal conclusions (338 F. Supp., at 79-116, Pet. A. 185-263) will readily make clear—with the *effectiveness* of a *remedy* for the long-continued constitutional violation.[15] Having evaluated in successive, actual operation (1) the freedom-of-choice plan, (2) the interim plan, and (3) Plan III, the court ultimately concluded that inter-division assignments provided the only realistic means to eliminate the persisting racial identifiability of the schools.[16]

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[15] The respondents' and government's briefs, focusing as they do on the non-issue of "violation," ignore entirely any discussion of the effectiveness of the various plans that were put before the District Court.

[16] The United States suggests that the District Court engaged in circular reasoning by making an initial arbitrary determination to look outside Richmond in measuring racial identifiability and then deciding that an effective means of eliminating that identifiability would require pupil reassignments outside Richmond. (See U.S.

The strenuous efforts of the respondents and the United States to rewrite the District Court's opinion (see note 3 *supra*) are ultimately futile.[17]

3. Most of the other factors discussed by the respondents as bearing on the District Court's exercise of discretion have been canvassed in our principal briefs and need not be rehashed here. To the extent that they do not ignore or go beyond the record,[18] respondents essentially substitute their own factual or judgmental conclusions for those of the District Court, and thereby seek impermissibly to

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Br. 13-15.) The government overlooks the facts that the District Court was concerned with: (i) the many traditionally black Richmond schools which had never been effectively desegregated, under free choice, the interim plan or Plan III, and which therefore presumptively retained their racial identities (see Pl. Br. 5-6, 11-13, 43, 89-90; RSB Br. 24-25, 36-37, 69); (ii) the evidence reinforcing that presumption of identity, i.e., the testimony defining the nature of racial identifiability and how it is perceived (see Pl. Br. 67, 86-100; RSB Br. 62-64); (iii) the evidence indicating the permeability for all other community concerns of the city-county boundary lines (see Pl. Br. 25-29, 94-95; RSB Br. 15-22); and (iv) the evidence indicating that the lines were freely crossed by the community's *educators* for valid educational purposes and had been so crossed in the past for the invalid purpose of segregation (see Pl. Br. 22-24, 29, 84-86, App. E, 1e-5e; RSB Br. 64-67, 77-82). It was this complex of factors and not an arbitrary preference for majority-white schools which led the District Court to explore "racial identifiability" in the context of the greater Richmond area.

[17] The distortion of the District Court's opinion required by these efforts is indicated by the Fourth Circuit's comment that the District Court "apparently adopt[ed] Dr. Pettigrew's viable racial mix theory," 462 F.2d, at 1063 n. 4, Pet. A. 568. That is simply not supported by a fair reading of the District Court's general findings and conclusions of law (338 F. Supp., at 79-116, Pet. A. 185-263).

[18] *Compare, e.g.*, St. Br. 89-90 with Pl. Br. 30-33, 90-97, App. F, 1f-4f, *and* RSB Br. 22-27, 69-70, 107-08; St. Br. 92-98 *with* Pl. Br., App. C, 1e-3e, App. D, 1d-3d, App. E, 1e-5e, *and* RSB Br. 32-34, 48-50; St. Br. 98-100 *with* Pl. Br. 22-23, 47-48 n. 67, 68-69 n. 100, *and* RSB Br. 52-53, 79 n. 75; St. Br. 100-02 *with* Pl. Br. 83 n. 135, App. D, 2d-4d, *and* RSB Br. 106-07.

upset that court's "broad discretionary power" in "shaping equity decrees." [19]

4. One point only at St. Br. 87-104 and U.S. Br. 17-21 seems to us to call for a reply. This is the assimilation of *San Antonio School District* v. *Rodriguez*, 41 U.S.L.W. 4407 (U.S., March 21, 1973), to respondents' own conception of "local control." (St. Br. 92-93; U.S. Br. 20-21.) We have already pointed out at Pl. Br. 22-24, 84-86, App. E, 1e-5e; RSB Br. 64-67, 77-82, that "local control" in Virginia is an accordion which collapses or expands as required to pipe the tune of racial segregation and resistance to desegregation in the public schools. For the one thing that is clear on this record is that from 1870 to the time of the District Court's decision, with respect to racial matters all school divisions either acceded to the directives of, or surrendered control to, state authorities. We have also noted that, to the extent that "local control" is a real concern and is not "racially based" (see Pl. Br. 85, n. 137; RSB Br. 78, n. 73), it is amply accommodated by the specific provisions of the Richmond School Board plan approved by the District Court.[20]

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[19] *Lemon* v. *Kurtzman*, 41 U.S.L.W. 4467, 4469 (U.S., April 2, 1973, opinion of the Chief Justice).

[20] See Pl. Br., App. C, 1c-3c, App. D, 1d-3d, App. E, 1e-5e; RSB Br. 32-34, 48-50. To summarize, consolidation was preferred by the Richmond School Board in part because it allowed greater local control than inter-division assignment pursuant to contract. (338 F. Supp., at 84, 191, Pet. A. 195, 430; see Pl. Br. 61-62; RSB Br. 49-50.) *Cf. Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 454-55 (1972). The Board's plan also provides for the creation of six administrative subdivisions, each with its own local board to which are delegated decision-making powers over various curricular and administrative matters—the very method which has proved effective in Fairfax County, Virginia. (See 338 F. Supp., at 191-92, Pet. A. 430-31; Pl. Br. 47-48, App. D, 3d; RSB Br. 49, 106.) Respondents' assertions of financial difficulties must

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5. We address finally respondents' argument that "[t]his Court must not say that black majority schools are intrinsically inferior or that black majority schools impose a feeling of inferiority on those black students who attend them" (St. Br. 48; see *id.*, 75-78, 85-86). The argument would lie better in the mouths of persons who had not penned black children into segregated schools during decades before and after *Brown*, and who now advance it in the service of perpetuating that same segregation. The sly suggestion that "it is the N.A.A.C.P." (St. Br. 76; *sic*) which has latterly invented the inferiority and degradation of the Southern "black" school requires neither analysis nor response. It is a patent outrage.

In *Brown*, after noting the finding of the lower court in the Kansas case that "segregation of white and colored students has a detrimental effect upon the colored children [and that the] . . . impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group . . . ", this Court stated:

> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

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be weighed against the total lack of any such problems in the administration of joint and regional schools throughout Virginia for many years (see Pl. Br. 22-23; RSB Br. 64-65), in light of the existence of state laws dealing specifically with the allocation of financing responsibility in a consolidated school system (see Pet. A. 611-12, 621; Pl. Br. App. D, 3d; RSB Br. 106-07), and in light also of the present power of state officials to require levels of expenditure sufficient to meet state-mandated minimum standards of educational quality (see Pet. A. 621-22; Pl. Br. App. C, 1c n. 1c, App. D, 3d-4d).

Respondents and the government apparently seek to cast doubt on the continued vitality of this finding through general and vague reference to a body of contemporary educational research (St. Br. 76-77; U.S. Br. 11). The relevance of their assertion to this case is dubious at best since this Court has never held it a prerequisite to relief dismantling a dual school system that black plaintiffs demonstrate they have suffered specific psychological harm in segregated schools or will make specific gains in integrated schools. The assertion also disregards, of course, the abundant testimony in this record, credited by the District Court, supporting the conclusion that racially identifiable schools do harm black children. (See RSB Br. 83-87.)

In any event, the implication that current educational research is at odds with the finding of *Brown* does not stand examination. Indeed, every major study conducted since 1954 supports and reinforces the conclusion that racial segregation in the public schools adversely affects the motivation and educational development of black children.[21]

Some researchers have questioned past assumptions that public schools are a principal instrument for establishing equality of status and condition. Some have challenged the notion that there is a demonstrable correlation between educational expenditures and the quality of education. See authorities cited in *San Antonio School District* v. *Rodriguez*, 41 U.S.L.W. at 4420. All, however, agree that racial composition of the classroom is a critical school factor in determining educational outcomes.[22] HEW's most recent

[21] See Office of Education, *Equality of Educational Opportunity* [The Coleman Report] 302-10 (1966); U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 96-114 (1967); Mosteller and Moynihan (Eds.), *On Equality of Educational Opportunity* 41 (1972); Jencks et al., *Inequality* 102, 109 (1972).

[22] Jencks, for example, concludes that the elimination of "racial and socio-economic segregation in the schools might reduce the test

port on the subject, after reviewing evidence compiled in veral communities, summarizes the findings as follows:

> "[E]vidence of gains [through desegregation] combined with the absence of alternative educational strategies with demonstrated superior effectiveness, suggests the high educational importance for desegregation in improving black academic achievement . . ." (Department of HEW, The Effectiveness of Compensatory Education, Summary and Review of the Evidence 176 (1972)).

Practical experience in communities that have desegre-ted their schools supports the research findings that de-gregation is beneficial and negates the veiled suggestion at the plan approved here may be politically unworkable. two 1972 studies covering fourteen school districts that d implemented desegregation plans, the U.S. Commis-on on Civil Rights found that students "have adjusted ickly and smoothly to the new school environment, often spite fears and anxieties of their parents," that "school segregation had begun to make inroads on the entrenched cial isolation and hostility with which most pupils and achers confronted each other in segregated systems," that mmunities had taken action often vigorous and creative to ad off problems, and that there was "widespread accept-ce of desegregation by those most intimately involved in e educational process—the students and the teachers." [22]

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re gap between black and white children and between rich and or children by 10 to 20 percent." See also "Perspectives on equality," 43 *Harvard Educational Review* (No. 1) at 39 ff. (February, 1973).

[22] U.S. Commission on Civil Rights, *Five Communities: Their arch fo Equal Education* 1-2 (1972); U.S. Commission on Civil ghts, *The Diminishing Barrier; A Report On School Desegrega-n in Nine Communities* 1-3 (1972). The fourteen communities

In sum, the issue in this case, as the government acknowledges, is a constitutional one. The research findings of educators and sociologists were relevant only as considerations for the district court to weigh in determining the most appropriate form of relief after finding a constitutional violation. The government's suggestion that the courts are being asked to choose among "various educational and sociological theories" (U.S. Br. 12) is a smoke screen.

We submit that the scope of remedial discretion should still be defined in terms of the feasibility of available alternatives, and that on this record inter-division assignments have been established as feasible, workable and educationally sound. The use of inter-division assignments as a desegregation tool in this case will provide the only means of avoiding the stark reality of black schools in Richmond, and white schools in Henrico and Chesterfield. Yet such assignments may be effected without expanding the time or distance of pupil transportation presently afforded within the individual school systems.

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included several, e.g., Charlotte-Mecklenburg, Tampa-Hillsborough, whose plans are similar to the plan adopted in this case. Experience with a desegregation plan implemented in January, 1973 in Prince Georges County, Maryland, the tenth largest school district in the nation, has also been positive. See, e.g., Washington *Star-News*, February 13, 1973, p. B-1.

CONCLUSION

For the foregoing reasons, and those set out in the principal briefs of the petitioners, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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